UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Crim. No. 02-02-B-S
	)	
ROBERT LEWIS,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON MOTION TO SUPPRESS AND TO DISMISS THE INDICTMENT

Defendant Robert Lewis has moved to suppress evidence and/or dismiss the indictment against him. The motion relates to Counts One and Three of the indictment, charging Lewis with crimes in connection with his possession of a firearm. Count Two of the indictment charges an attempt to commit robbery at a business that affects interstate commerce and is not the subject of this motion. I recommend that the court **DENY** the motion.

Defendant's Proffer of Facts

Defendant has not filed any affidavits or other evidentiary submissions to support this motion, but has provided a proffer in the memorandum accompanying the motion. According to that proffer, Lewis could establish the following facts:

> James Mayo, a long-term acquaintance of the Lewis's, worked with the police in this case to secure Lewis's arrest. Lewis suspects that Mayo is himself a felon, but does not have a copy of his record. Among other things, Lewis was charged with, and ultimately indicted for, being a felon in possession of a firearm. Lewis was also indicted for attempted robbery. Taped conversations between Lewis and Mayo suggest that they were planning a robbery.
>
> Mayo reintroduced the notion of getting a gun to commit the robbery after Lewis explicitly rejected the concept. Mayo, in fact, said that he could get a gun for the robbery. Mayo was aware at all relevant times that the agents would supply a gun and, given Mayo's conduct, it is fair to infer that it was a priority to introduce a gun into the scheme even after Lewis rejected the notion of using a gun. Mayo mentioned more than

once that he could get a gun. Lewis never offered to get a gun and there is no evidence that he ever attempted to get a gun himself.

The police selected the firearm at issue, disabled it so that it was not capable of being fired, treated it with a fluorescent paste, then placed the firearm in a paper bag in the glove compartment of Mayo's pickup truck. The police were careful to plant a weapon that would be considered a firearm under federal law, in spite of its being disabled. Nothing prevented them from using an air-powered pistol, for example. The police could have used a weapon that would not have given rise to federal jurisdiction if they had so chosen.

Mayo was aware of this plan and actively participated in it. All were aware that Lewis had a felony record and that he would be vulnerable to federal charges should he come into possession of a firearm. Indeed local law enforcement was consulting with a federal firearms agent during the course of this case.

On October 11, Mayo picked up Lewis in his pickup truck. Sheriff's deputies recorded the conversation between the two and followed in their cars. Mayo informed Lewis that there was a gun in the glove compartment. Lewis did not ask to see the gun and did not try to remove it from the glove compartment, but Mayo urged Lewis to "check it out." Apparently Lewis did not respond to the urging because Mayo went on to say, "When do you want to look at it? On the way back or what?" The two then had a discussion about the gun. Three minutes later, the police arrested Lewis.

The United States has produced a videotape that shows that portions of Lewis's hand fluoresced under ultraviolet light after the arrest, suggesting that he indeed handled the gun. During an interview with police after his arrest Lewis stated that he took the gun out of the paper bag and looked at it.

The United States disputes only the characterization that Mayo urged Lewis to possess the gun. As the bulk of the exchanges between Mayo and Lewis were subject to monitoring or tape recording the essential facts are not in dispute.

Discussion

Although Lewis captions his motion as a motion to suppress and dismiss, the limited case law he cites does not support the notion that the exclusionary rule has any applicability to an assertion of outrageous governmental conduct. The primary case he cites, United States v. Penagaricano-Soler, 911 F.2d 833 (1st Cir. 1990), speaks of the matter in terms of a

constitutional defense arising under the due process clause. Id. at 838-839 & n.1 ("We have recognized 'outrageous governmental conduct' as a valid defense, without ever having seen one."). Lewis does not assert that his statements made to agents were involuntary nor does he argue that any evidence was improperly seized. A showing of outrageous government conduct, if properly made out, results in dismissal of charges, not the exclusion of evidence. United States v. Bouchard, 886 F.Supp.111, 121 (D. Me.1995) ("[S]ince the doctrine of outrageous conduct is normally associated with over[-]involvement of government in the commission of a crime, the appropriate remedy is a dismissal of the charges, rather than suppression of specific evidence.") For that reason alone, the motion to suppress should be denied.

Turning to the motion to dismiss, the next issue is whether or not I should hold an evidentiary hearing on that aspect of the motion. The test for granting an evidentiary hearing in a criminal case is a substantive one, "did the defendant make a sufficient threshold showing that material facts were in doubt or dispute?" United States v. Panitz, 907 F.2d 1267, 1273 (1st Cir. 1990). In the present case Lewis has not made any showing that material facts are in doubt or dispute. The only dispute with the United States centers on the choice of the word "urging" to describe Mayo's undisputed conduct. Lewis has not indicated by proffer or otherwise that Mayo or law enforcement agents did any more than previously described. On these basically undisputed allegations Lewis has not shown the need for an evidentiary hearing on this motion.

Finally, I must determine whether these undisputed facts rise to the level of outrageous governmental conduct warranting dismissal of the two counts of the indictment alleging the involvement of a firearm. 'The question of whether the government committed misconduct so outrageous as to warrant the dismissal of the charges is a question of law." United States v. Nunez, 146 F.3d 36, 38 (1st Cir. 1998). The doctrine holds that the government's misconduct is

so outrageous as to warrant dismissal when the government "behaves in a manner that violates fundamental fairness and shocks the universal sense of justice." Id. (quoting United States v. Santana, 6 F.3d 1, 4 (1st Cir. 1993), internal quotation marks and alterations omitted).

The thrust of Lewis's argument is that the law enforcement agents took his proclivity to commit a robbery at a local pawnshop and deliberately made a federal case out of it. Lewis does not challenge the assertion that he agreed with Mayo to plan a robbery of the pawnshop. He asserts, however, that he did not want to get a gun to do the job. He furthermore takes issue with the fact that the agents deliberately chose a gun that would meet a federal statutory definition. He does not, at this juncture,[1] deny that he and Mayo were longtime associates nor that they freely planned the underlying criminal conduct.

The First Circuit has made clear that there is no "tidy test" to determine whether government conduct qualifies as outrageous. Nunez, 146 F.3d at 38. The legal doctrine of dismissal based upon objectively outrageous government conduct does not enjoy favor and has been described by the First Circuit as "moribund." United States v. Santana, 6 F.3d 1, 4 (1st Cir. 1993). "[I]n practice, courts have rejected its application with almost monotonous regularity." Id. However, the First Circuit has never completely rejected the defense and presumably if presented with the right set of "outrageous" facts, a court could dismiss an indictment on this basis. This record does not present those facts.

Conclusion

Based upon the record before me I now recommend that the court **DENY** both the motion to suppress and the motion to dismiss the indictment. I further recommend that the court hold no further evidentiary hearing on either motion at this time.

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[1] Whether Lewis can or will adopt an entrapment defense at trial, of course, remains an open question. See Bouchard, 886 F.Supp. at 114 -16 (discussing availability of "subjective" entrapment defense and its interrelationship with the outrageous government conduct defense).

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

_____
Margaret J. Kravchuk
U.S. Magistrate Judge

Dated March 5, 2002

TRLLST

U.S. District Court

District of Maine (Bangor)

CRIMINAL DOCKET FOR CASE #: 02-CR-2-ALL

USA v. LEWIS Filed: 01/08/02

Other Dkt # 1:01-m -00055

Case Assigned to: Judge GEORGE Z. SINGAL

ROBERT L LEWIS (1) JON HADDOW, ESQ.

defendant [COR LD NTC cja]

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Pending Counts: Disposition

18:922G.F UNLAWFUL TRANSPORT OF FIREARMS, ETC.; FELON IN POSSESSION OF FIREARM

(1)

18:1951.F INTERFERENCE WITH COMMERCE BY THREAT OR VIOLENCE; ATTEMPTED ROBBERY AFFECTING INTERSTATE COMMERCE

(2)

18:924C.F VIOLENT CRIME/DRUGS/MACHINE GUN; CRIME OF VIOLENCE SENTENCE ENHANCEMENT

(3)

Offense Level (opening): 4

Terminated Counts: NONE

Complaints Disposition

Ct. I - 18:922(g)(1) - Felon in possession of a firearm

[1:01-m -55]

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